

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY  
COMMISSION, SHIMLA**

**Case No. 107 to 113/ 2002**

**In the matter of:**

Suo moto notice under Section 45 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) issued on May 15, 2002 for contravention of direction No.7.26 of Tariff Order dated October 29, 2001, issued in the name of:

1. Kr. Shamsher Singh, Chairman
2. Sh. H.C.Thakur, Member (Tech.)
3. Sh. M.C.Pandey, Member (Op.)
4. Sh. R.K.Sharma, Member (Civil)
5. Sh. K.S.Narang, Member (F&A)
6. Sh. J.S.Rana, Member (Admn.)
7. HPSEB through Secretary;

<b>Present for:</b>	1 Kr. Shamsher Singh, Chairman	S/Shri D. D. Sood, Ankush Dass Sood and Ms Shilpa Sood, Advocates.
	2 Shri K. S. Narang, Member (F&A)	-do-
	3 Sh. J. S. Rana, Member (Admn.)	Sh.K. D. Shreedhar, Advocate
	4 Sh H. C. Thakur, Member (Tech.)	S/Sh. Kuldeep Singh & Bimal Gupta, Advocates.
	5 Shri M. C. Pandey. Member (Op.)	S/Shri D.D.Sood, Ankush Dass Sood and Ms Shilpa Sood, Advocates.
	6 Sh R. K. Sharma, Member (Civil)	Sh.K. D. Shreedhar, Advocate
	7 HPSEB thro' Secretary	Sh. K. D. Shreedhar, Advocate

## **ORDER-CUM-DIRECTION**

### **I. BACKGROUIND:**

In the STATEMENT OF OBJECTS AND REASONS in INTRODUCTION Chapter of ERC Act, 1998 overly emphasis has been placed on focussing on fundamental issues facing the power sector namely the lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, etc. etc. The Common Minimum National Action Plan for Power (CMNPP) acknowledged that the financial position of State Electricity Board is fast deteriorating and the future development in the power sector cannot be sustained without viable State Electricity Boards and the improvement of their operational performance.

On the petitions filed by HPSEB for determination of Annual Revenue Requirement, Transmission & Bulk Supply Tariff and Distribution & Retail Supply Tariff for the FY 2001-02, some of the objectors had raised the objections that the capital cost per MW of the Board's power projects was very high; in Malana, the project cost was only Rs.3.75 crores per MW as against the Board's own projects costing between Rs.5.5 to Rs.7 crores per MW. This point was also raised during the course of public hearings. The Commission observed that this needed deep study and investigation with a view to build up learning and skill inventories of the Board to compete with the Malana project management.

The Commission vide direction No.7.26 in Chapter 7 of its Tariff Order dated October 29, 2001 had ordered to the Board as under:

“During the course of the hearing some objectors have raised a point on the high capital cost of the HPSEB's plants as compared to the Malana Plant. The Commission observes that this needs deep study and investigation with a view to build up learning and skill inventories of the Board to compete with the Malana project management. The Commission directs the Board to do a comparison of the capital cost of the Malana plant with the capital cost of the HPSEB's plants and submit a report on this by March 31, 2002.”

This direction was issued with a view to carrying out deep study and investigations for building up learning and skill inventories of the Board to bring down the cost per MW

in the future projects as also to learn lessons from this project for future project implementation for efficient costs and project management.

The Chief Engineer (Com.) vide his letter No. HPSEB/CE(Comm.)/SERC-1/2002-160 dated April 1, 2002 had stated that the comparison of the capital cost of Malana Project with the capital cost of HPSEB's plants could not be done at this stage because there were incomplete works at Malana site and also some repair and rehabilitation works were to be carried out by Malana Power Company which would inflate the capital cost of the project and, therefore, submitted that the comparison could actually be done after the completion of the Malana Project based on the actual expenditure incurred by the Malana Project Company for the completion of all works at site.

The said direction was issued by the Commission in the larger interest of the Board as well as the consumers of the State and the Commission is totally in dark as to the steps taken, study conducted, investigation undertaken and the difficulties being faced by the Board in order to comply with the said direction of the Commission and the Commission was convinced that it must hear the concerned Member (Civil) to explain the difficulties, if any, in obtaining the information from Malana power Company for the purpose of carrying out the comparison. The personal presence was felt absolutely essential for reasons of personal knowledge that the concerned Member alone could be in possession of.

The Commission, therefore, issued administrative direction to HPSEB through Secretary vide letter No. HPERC/ED (TFA)/AM/461/NKV-2002-4722 dated 3-5-2002 to ensure the attendance of Member (Civil) on May 14, 2002 so that the Commission could discuss the matter further.

Member (Civil) failed to attend the Commission on May 14, 2002 in person and thereby lost an opportunity of being facilitated in solving the difficulties to carryout the comparison as required in the said direction The Commission has the power under Section 12 of ERC Act to summon and enforce the attendance of any witness and discovery and production of any document or other material object producible in evidence and requisition of any public record and it could have helped the Board in

accessing information from the Malana Power Company for necessary study and investigation.

By such a study and comparison and by emulating the project management techniques of Malana Power Co; the Board could have considerably economised on its costs in establishing a power plant. It would result in lower tariffs for the consumers of Himachal Pradesh.

In the above noted matter, the Commission was prima facie satisfied from the material placed on record on behalf of HPSEB that the respondents namely, 1 to 7 had jointly and severally contravened the direction No.7.26 issued on October 29, 2001 by the Commission. The Commission, therefore, issued a suo moto notice to the aforesaid persons on May 15, 2002 to show cause why action in terms of Section 45 of the ERC Act, 1998 and Regulation 51 of HPERC's Conduct of Business Regulation be not initiated jointly and severally against the Chairman and Members of the Board and further directed to file his/her reply with the Commission by June 14, 2002 and also to state whether he/she would like to be heard in person.

The Respondents/objectors filed their replies in identical form on June 12, 2002 and the case was heard on June 21, 2002 and adjourned for June 22, 2002 at the request of respondents to hear all the cases together.

The case was heard together with other show-cause notice cases where individual but similar replies have been filed by the respondents.

## **II. DEFENCE TAKEN BY RESPONDENTS:**

All the persons were called to appear for oral arguments if they chose to do so.

At the hearing the Commission read out the respondents'/objectors contentions contained in the replies/objections as under:

a) Reply paras A to C, G, J and I:

This Commission has no inherent jurisdiction to issue the notice in view of the statement of Objects and Reasons of the ERC Act. The main functions of the Commission are prescribed in Section 22(1) of the Act. The Commission has no powers beyond Section 22(1) because the State Government has so far not assigned any functions under section 22(2) to the Commission. The jurisdiction to attract Section 22 (2) is completely lacking in the instant case. Therefore the Commission has no jurisdiction to proceed on the basis of the notice under reply. Moreover, it was

incumbent on the Commission to seek prior directions from the State Government under Section 39 of the ERC Act whether or not respondents/objectors had disobeyed any lawful direction of the Commission.

b) Reply para D:

The directions given by the Commission in the Tariff Order dated October 29,2001 are without jurisdiction and the alleged non-compliance of such direction is of no consequence. The Commission cannot take cognizance of such directions.

c) Reply para E:

The HPSEB has been constituted under Section 5 of the Electricity (Supply) Act, 1948 and incorporated under Section 12 of that Act. The HPSEB has to perform its general duties under Section 18, 19 and 26 of the Supply Act which is further to be read with Section 22 of the Indian Electricity Act, 1910. The Commission has not been made the super authority of the HPSEB nor the HPSEB has been made subordinate to the Commission. Hence the Commission has exceeded its limits in issuing the notice. The notice is beyond the scope of the powers of the Commission.

d) Reply para F:

Even if Commission's jurisdiction be assumed, the Commission's order dated October 29,2001 is incapable of compliance overnight for want of funds. The Commission has not appreciated the genuine difficulty of the HPSEB while issuing the notice under reply.

e) Reply para H:

The Commission has committed jurisdictional error by not appreciating that the action taken by the respondents/objectors was in good faith and was protected by the provisions of Section 82 of the Supply Act, Section 56 of the Electricity Act and Section 43 of the ERC Act. Bad faith has not been attributed to the respondents/objectors in the notice. HPSEB is a corporate body and individual liability as sought to be fastened on the respondents/objectors in the notice is not only vague but is wrong, illegal and without jurisdiction as well.

f) Reply para K:

The notice is vague on material particulars and is incapable of proper and effective reply. Respondents/objectors reserved right to add, amend, alter or vary the objections to the notice later on.

g) Reply para L:

Notice is against the principles of natural justice in as much as the Commission has prejudged the issue and has virtually given the verdict before hearing the respondents/objectors.

h) Reply para M:

There was a presumption of bonafides in favour of the respondents/objectors under section 114(e) of the Evidence Act, 1872 and the Commission had no material to rebut that presumption while issuing the notice.

### **III. POINTS AT ISSUE:**

Arising out of the above contentions, the Commission posed the following points for consideration and called upon the Ld. Counsels to address arguments on the specific points so raised in their own manner and answer them unambiguously:

- i) Is there any direct or indirect legal prohibition against the Commission for taking the impugned action in view of the specific provisions contained in sections 22(1), 27, 39, 45, 47, 49 & 52 of the ERC Act?
- ii) Why did the HPSEB file the petitions before the Commission if it had the slightest doubt as to the jurisdiction of the Commission?
- iii) Why the pleas now being taken in the reply were not/could not be urged during the course of proceedings in the matter of determination of Tariff?
- iv) Is it permissible to the HPSEB to say that it would accept the Tariff Order in part relating to its rights only and not accept its other part in regard to its obligations?
- v) Whether the directions contained in Part 1 of the Chapter 7 of the Tariff Order being based on the own undertaking of the HPSEB through the affidavits can be ignored by the respondents/objectors?
- vi) Why were the remedies available under section 12 (f) and section 27 of the ERC Act not availed in case the HPSEB sincerely felt that the Tariff Order was not capable of implementation and was arbitrary?
- vii) Can the Commission once having issued the Tariff Order withdraw it and can the HPSEB disobey it? What is the alternative left now ?

- viii) What is the vagueness in the notice, which renders it incapable of proper and effective reply? How is the show-cause notice devoid of prima facie case and on what basis the pre-judgement and pre-determination is attributable to the show cause notice? Were the HPSEB's own affidavits, undertakings and acquiescence of the Tariff Order not the material enough before the Commission for making a prima facie case against the respondents/objectors?

#### **IV DEFENCE ARGUMENTS:**

The oral arguments were then addressed by S/Shri D.D. Sood, Kr. Kuldip Singh and K. D. Shreedhar, the Ld. Counsels for the respondents in that order.

**Shri D. D. Sood, Ld. Counsel for Kr. Shamsher Singh and Shri K. S. Narang** drew attention of the Commission to a 'public interest litigation' (CMP/757/ 2002) having been filed by one Shri Arvind Sharma, son of Shri Des Raj, Advocate of Lower Bazar, Shimla challenging the appointment of Chairman of HPERC in support of his contention that the Commission might consider deferring the hearings in all the show-cause cases until after the decision of the Hon'ble High Court and cited the judgement reported in AIR SC 1962 Page 1622/1680. He was asked to file a copy of the said judgement of the Hon'ble Supreme Court for proper appreciation in the context, facts and the circumstances of the case. Nevertheless, the Commission ruled that the proceedings may continue.

The Ld. Counsel went on to state that the Govt. of Himachal Pradesh had established the H.P. Electricity Regulatory Commission vide notification dated 14-06-2001 and the functions under Section 21(1) of the Act alone had been conferred upon the Commission. He then read Section 22 of the ERC Act which is reproduced below: -

“22. Functions of State Commission.

(1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely: -

- a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;
- b) to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29;

- c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;
- d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act.

(2) Subject to the provisions of Chapter III and without prejudice to the provisions of sub-section (1), the State Government may, by notification in the Official Gazette, confer any of the following functions upon the State Commission, namely: -

- (a) to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities operating within the State;
- (b) to aid and advise the State Government, in matters concerning electricity generation, transmission, distribution and supply in the State;
- (c) to regulate the operation of the power system within the State;
- (d) to issue licences for transmission, bulk supply, distribution or supply of electricity and determine the conditions to be included in the licences;
- (e) to regulate the working of the licensees and other persons authorised or permitted to engage in the electricity industry in the State and to promote their working in an efficient, economical and equitable manner;
- (f) to require licensees to formulate perspective plans and schemes in coordination with others for the promotion of generation, transmission, distribution, supply and utilisation of electricity, quality of service and to devise proper power purchase and procurement process;
- (g) to set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service;
- (h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to the customers;
- (i) to lay down and enforce safety standards;
- (j) to aid and advise the State Government in the formulation of the State power policy;



- (k) to collect and record information concerning the generation, transmission, distribution and utilisation of electricity;
- (l) to collect and publish data and forecasts on the demand for, and use of electricity in the State and to require the licences to collect and publish such data;
- (m) to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State including the conditions governing entry into, and exit from, the electricity industry in the such manner as to safeguard the public interest;
- (n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration;
- (o) to coordinate with environmental regulatory agencies and to evolve policies and procedures for appropriate environmental regulation of the electricity sector and utilities in the State; and
- (p) to aid and advise the State Government on any other matter referred to the State Commission by such Government;

(3) The State Commission shall exercise its functions in conformity with the national power plan.”

He argued that the functions under Section 22 (1) were general in nature and empowered the Commission only with the determination of tariff as in sub sections 1(a) and 1(b) and the power purchase and procurement process as in sub section 1(c). The powers to regulate were covered only in Section 22 (2). Unless powers under Section 22 (2) are also assigned by notification by the State Government, the Commission could not exercise the powers of issuing directions contained in Chapter 7 of the Tariff Order. The directions issued in Chapter 7 of the Tariff Order were tantamount to day-to-day monitoring of the functions of the Board. If due to non-compliance of the directions issued by the Commission, the Board suffered loss, it was for the State Government to take action. Section 39 gave the power to the State Government to issue policy directions to the Commission and if the Commission felt that the Board was not complying with the directions given in the tariff order, it could advise the State Government to issue directions to the Board to do so. The provisions of Section 45 were attracted only if the Commission had the powers to issue directions under Section

22 (2). He argued that because there was nothing specific in Section 22 (1), which gave the powers of issuing the directions, it did not lie within the jurisdiction of the Commission, therefore, to issue directions as in Chapter-7 of the Tariff Order dated October 29, 2001. The Commission had only the powers to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29 as given in sub section (1) (a) or to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29 as per sub section (1) (b). He went on to say that the Commission had only the powers of determination of the tariff but could not enforce the tariff as may be determined by it and if at all the Commission felt that certain factors which had influenced its judgement in arriving at and determining the tariff it could send suggestions to the State Government and ask the State Government to issue the same as policy directions under Section 78A of the Electricity Supply Act, 1948. It could, therefore, advise the State Government but not the Electricity Board. The Id. Counsel then went on to read Section 29 of ERC Act and emphatically reiterated that the Commission had only the powers of determination of the tariff but not the powers of implementation of the tariff so determined by it or the consequences arising out of the non-implementation thereof.

The Ld. Counsel in his oral arguments stressed that the functions under Section 22(1)(a) were general in nature, which empowered the Commission with the determination of tariff, and power purchase and procurement process whereas the power to regulate were covered under Section 22 (2). The directions as contained in the Tariff Order could only have been issued, had the Commission been vested with the powers under Section 22 (2). The Commission could not enlarge its jurisdiction to include the functions under Section 22 (2) of the Act.

The Id. Counsel further stated that for the determination of tariff, the Commission is to be guided by Section 29 of the ERC Act, 1998. He read out the provisions of Section 29 which is reproduced as follows:

“29. Determination of tariff by State Commission: -

(1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the “tariff”), shall

be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

(2) The State Commission shall determine by regulations the terms and conditions for the fixation to tariff, and in doing so, shall be guided by the following, namely: -

- (a) the principles and their application provided in sections 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and Schedule VI thereto;
- (b) in the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948 (54 of 1948);
- (c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency;
- (d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;
- (e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;
- (f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;
- (g) national power plans formulated by the Central Government;

(3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) The holder of each licence and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues.

(5) If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under this section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for licence or any other person concerned to implement the subsidy provided for by the State Government.

(6) Notwithstanding anything contained in sections 57A and 57B of the Electricity (Supply) Act, 1948 (54 of 1948) no rating committee shall be constituted after the date of commencement of this Act and the Commission shall secure that the licensees comply with the provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in accordance with the provisions of this Act”

The Id. Counsel read out Section 18 Chapter-IV of Electricity (Supply) Act, 1948 “Powers and Duties of State Electricity Board and Generating Companies” which are reproduced as under:

“18. General duties of the Board: -

Subject to the provisions of this Act, the Board shall be charged with the following general duties, namely:

- (a) to arrange, in coordination with the Generating Company or Generating Companies, if any, operating in the State, for the supply of electricity that may be required within the State and for the transmission and distribution of the same in the most efficient and economical manner with particular reference to those areas which are not for the time being supplied or adequately supplied with electricity;
- (b) to supply electricity as soon as practicable to a licensee or other person requiring such supply if the Board is competent under this Act so to do;

- (c) to exercise such control in relation to the generation, distribution and utilisation of electricity within the State as is provided for by or under this Act;
- (d) to collect data on the demand for, and the use of, electricity and to formulate perspective plans in coordination with the Generating Company or Generating Companies, if any, operating in the State for the generation, transmission and supply of electricity within the State;
- (e) to prepare and carry out schemes for transmission, distribution and generally for promoting the use of electricity within the State; and
- (f) to operate the generating stations under its control in coordination with the Generating Companies, if any, operating in the State and with the Government or any other Board or agency having control over a power system.

The Id. Counsel inferred that the HPSEB had the powers and duties as assigned in Section 18 of ES Act, 1948 and the State Regulatory Commission under Section 22(1) of ERC Act, 1998. Nowhere had the HPSEB been subordinated to the Regulatory Commission, each one had its own job to do. He summed up by taking the following position vis-à-vis the points at issue posed for consideration:

i) Is there any direct or indirect legal prohibition against the Commission for taking the impugned action in view of the specific provisions contained in sections 22(1), 27, 39, 45, 47, 49 & 52 of the ERC Act?

S. 22 (1). The Commission had powers only of determination of the tariff and not the powers to punish. It had no regulatory control over the Electricity Board with regard to powers under sub section (d) of Section 22(1) i.e. to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act. The provisions have to be read with sub sections (a), (b) and (c). The powers under Section 22 (1) are of general nature whereas those of 22(2) are of specific nature and unless the powers are delegated under Section 22(2) the

Commission had no jurisdiction to issue any direction of whatsoever nature. Particular reference was made to Section 22(2)(g) i.e. “to set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service” which was of specific nature and directions could be issued only if powers had been delegated under Section 22 (2) (g). In that view, there was a legal prohibition against the Commission for taking the impugned action. The Commission could bring about the enforcement of its Tariff Order only through suggestions and not by fine. To a query from the Commission whether the Commission could take over the management of the Board, had the powers been delegated under Section 22 (2), the Ld. Counsel said it could not.

Section 27: The Board has not agitated the determination of the tariff and, therefore, it did not go for any appeal against the Tariff Order to the High Court. It was only questioning the issue of directions as in Chapter 7 of the Tariff Order dated October 29, 2001. To that extent there was legal prohibition against the Commission for taking the impugned action.

Section 39: The Commission could send its recommendations to the State Government with request to issuing the same as directions under Section 78A of the Electricity (Supply) Act, 1948 to the Electricity Board if it so desired. The Commission could not give directions to the HPSEB. In that manner of speaking there was legal prohibition against the Commission for taking the impugned action.

Section 45: This Section is invoked only if there is a contravention of the tariff rates i.e. over-charge or undercharge. Since the Commission had not been delegated powers under Section 22 (2), it could not give directions to the Board and thus served as a legal prohibition against the Commission for taking the impugned action.

Section 47: This section was not applicable.

Section 49: This section was not applicable.

Section 52: The Ld. Counsel argued that the overriding effect given in section 52 of the ERC Act, 1998 is only with respect to the functions as conferred upon the Commission

under Section 22 (1). The Id. Counsel referred to the protection to the persons acting under the Electricity (Supply) Act, 1948 in Section 82 that no suit, prosecution or other legal proceeding would lie against any member or officer or other employee of the Board for anything which was in good faith done or intended to be done under this Act. No penal consequences could ensue on account of any affidavit or undertaking given by HPSEB during the course of hearings on the tariff provisions. He also argued that they would not be in any case relevant.

Point Issue (ii) Why did the HPSEB file the petitions before the Commission if it was so sure about the non-jurisdiction of the Commission?

The Ld. Counsel said that jurisdiction of the Commission with regard to the determination of tariff was not in dispute. The HPSEB had approached the Commission for determination of tariff which matter was indeed in the jurisdiction of the Commission.

To a query from the Commission whether the function could be split and divided between determination, implementation and consequences arising out of non-implementation, the Id. Counsel replied that whilst the determination was within the jurisdiction of the Commission, implementation was not. It was with the Board. The Act did not give any power to the Commission in respect of implementation of the tariff. The Commission could not take over this function of the Board.

Point Issue (iii) Why the pleas now being taken in the reply were not/could not be urged during the course of proceedings in the matter of determination of Tariff?

Ld. Counsel argued that the Board had come to the Commission for tariff determination and not for punishment. It could not have raised the contention with regard to non-applicability of Section 45 at the time of filing of petition.

Point Issue (iv) Is it permissible to the HPSEB to say that it would accept the Tariff Order in part relating to its rights only and not accept its other part in regard to its obligations?

Ld. Counsel argued that the Board had accepted the Tariff Order whereas the directions were policy matters of the Board.

Point Issue (v) Whether the directions contained in Part 1 of the Chapter 7 of the Tariff Order being based on the own undertaking of the HPSEB through the affidavits can be ignored by the respondents/objectors?

The Ld. Counsel argued that the affidavits/undertakings given by the Board during the proceedings on tariff determination were to facilitate the Commission in the fixation of tariff and if the Commission felt that any affidavit was incorrect, it had every right to slash the tariff.

He proceeded on to say that the Board was not aware if any consumer had been overcharged vis-à-vis the tariff so determined by the Commission. The implementation of the directions given by the Commission in Chapter 7 of the Tariff Order required lot of funds and the Commission had ignored this fact while passing the directions.

To a point raised from the Commission that the Commission had asked HPSEB to only submit the plans and studies which did not require much funds, the Ld. Counsel said he was not discussing the merits. To another query from the Commission as to what to do where the Commission had allowed higher revenue over what had been asked for by the Board as in para 5.15 of the Tariff Order and as in para 4 of Annexure 5.2 (Schedule of General and Service Charges) of the Tariff Order to the extent of Rs.3.60 crore for replacement of dead stop/defective meters after March 31, 2002 the Ld. Counsel submitted that the loss was to the Board only and if the Commission felt that the Board had not taken action to replace the meters despite the higher meter rent allowed by the Commission, the Commission could reduce the rental thereof.

Point Issue (vi) Why were the remedies available under Section 12 (f) and Section 27 of the ERC Act not availed in case the HPSEB sincerely felt that the Tariff Order was not capable of implementation and was arbitrary?



The Id. Counsel stated that the Board was implementing the Tariff Order and the same was not in dispute. What was in dispute were the directions.

To another query if sub section (d) of Section 22 (1) did not apply to implementation of tariff in efficient and economical manner the Id. Counsel said that the provision of Section 22 (1)(d) was by way of suggestion only as the implementation of this had specifically been provided in clauses (c) (g) and (h) of sub section 22 (2). The time to take action for non-compliance of the directions would be at the time of determination of tariff as and when the Board files the next petition.

Point Issue (vii) Can the Commission once having issued the Tariff Order withdraw it and can the HPSEB disobey it? What is the alternative left now?

The Id. Counsel argued that the Board was obeying the Tariff Order in respect of rates.

Point Issue (viii) What is the vagueness in the notice which renders it incapable of proper and effective reply? How is the show-cause notice devoid of prima facie case and on what basis the pre-judgement and pre-determination is attributable to the show cause notice? Were the HPSEB's own affidavits, undertakings and acquiescence of the Tariff Order not the material enough before the Commission for making a prima facie case against the respondents/objectors?

The Id. Counsel said that the notices issued by the Commission were vague in that they did not contain any statement of charges.

The Id. Counsel concluded by saying that the HPSEB was not questioning the Tariff Order insofar as the rates were concerned; it was only questioning the jurisdiction of the Commission in issuing the directions contained in Chapter 7 of the Tariff Order while admitting that the directions so given by the Commission were good aimed at giving a better deal to the consumers of the State.

**Kr. Kuldeep Singh, Id. Counsel for S/Shri J. S. Rana and M. C. Pandey** next took over:

The Id. Counsel did not want to repeat what his other learned colleague Shri D. D. Sood had argued. He argued that the Part 1 of Chapter 7 of the Tariff Order contained the directions during the process of tariff determination and they were of no significance as they had merged in the Tariff Order. The directions given under paras 7.1 to 7.14 could be given only if powers under Section 22 (2) had been conferred upon the Commission. He went on to dwell on the question whether these could be given. For this purposes Section 22 (1) of ERC Act had to be strictly construed. In order to properly construe section 22 (1) he read out salient features of the Electricity Regulatory Commissions Ordinance, 1998 promulgated by the President on April 25, 1998 as contained in para 4 (b) (i) (ii) & (iii) and compared the same with Clauses (a)(b)(c) and (d) of Section 22 (1). Then he read out from pages 3 and 4 of the written reply:

Para (B) of written reply: “The Governor, Himachal Pradesh, in exercise of powers under Section 17(1) of the Act vide Notification dated 30-12-2000 has established the Commission and vide Notification dated 14-6-2001 the Governor has been pleased to order that the Commission shall discharge the following functions as provided under Section 22 (1) of the Act:-

- (a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;
- (b) to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29;
- (c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;
- (d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act.

In the Notification dated 14-6-2001 it has been clarified that any of the other functions indicated under Section 22 (2) of the Act may be ordered to be discharged by the Commission as decided by the competent authority from time to time. No function under Section 22 (2) of the Act till now has been assigned by the competent authority to the Commission. Therefore, the Commission is authorised to discharge functions

enumerated under Section 22 (1) of the Act only and nothing more than that. The functions assigned to the Commission vide Notification dated 14-6-2001 are none other than the functions referred in Section 22 (1) of the Act. The Clauses (a)(b)(c) of Section 22 (1) are with respect to specific functions and clause (d) of sub-section (1) of Section 22 of the Act is to be read with Clauses (a)(b)(c). In other words, clause (d) is to be read ejusedem generis. The perusal of Section 22 (1) of the Act would reveal that main function of the Commission is determination of tariff, to regulate power purchase and procurement process of the transmission utilities and distribution utilities for transmission, sale distribution and supply in the State. In addition to this the Commission has no power. Therefore, notices are without jurisdiction.”

The Id. Counsel said that the clauses (a)(b)(c) of sub Section (1) are with respect to specific functions and Clause (d) of sub section (1) of Section 22 of the Act is to be read with Clauses (a)(b)(c). In other words clause (d) is to be read ejusedem generis. The intention of the legislation is to confer the limited powers first and then the full powers in due course. The Id. Counsel referred to Clauses (g) and (k) of Section 22(2) and inferred that HPERC had not shown its inability to proceed with the tariff petition without information and data asked in the directions, which was essential for the determination of the tariff. He further said that no review of the tariff is pending before the Commission, and no complaint of the violation of the Tariff Order has been brought to the notice of the Commission. The Commission had no powers to implement its Tariff Order and since the notices are connected with the implementation they are without jurisdiction. He also supported his colleague’s contention that “to regulate” did not mean “to give directions” and without powers under Section 22 (2) the provision under clause (d) of section 22 (1) had very limited scope. He referred to **SC AIR 1972 page 1863, para-9** to prove his point that clause (d) is to be read ejusedem generis. He also referred to para-15 of the same judgement.

The Id. Counsel then came to the points at issue posed by the Commission.

- (i) Yes. There is direct as well as indirect legal prohibition against the Commission for taking the impugned action. In view of the specific provisions contained in the Act it could not go beyond section 22 (1).

- (a) Section 27. Not relevant.
  - (b) Section 39. The direction given by the State Government to the State Commission is binding but has nothing to do with the present controversy.
  - (c) Section 45. Question of punishment comes after jurisdiction and since the Members and the Chairman of the Board are the employees of the State Government they enjoyed the protection under Section 43 of ERC Act, 1998.
  - (d) Section 47: They are first the Government officers and then the Board's Members.
  - (e) Section 49: Harmonious interpretation has to be given to the Act, Rules and Regulations.
  - (f) Section 52. The overriding effect is only in respect of the determination of the tariff and not in general terms.
- (ii) The Commission's jurisdiction over the tariff is not in question.
  - (iii) Question of jurisdiction can be taken at any time even in the collateral proceedings even if it lacks inherent jurisdiction.
  - (iv) HPSEB has accepted the Tariff Order only in respect of the rates and not directions.
  - (v) Undertakings given by the HPSEB being outside the jurisdiction of the Commission are not binding and cannot confer jurisdiction upon the Commission. These, therefore, could not be used against the Board.
  - (vi) HPSEB is not questioning the tariff rates.
  - (vii) No one has approached the Commission for review of the Tariff Order, therefore, the question of withdrawing the tariff rates does not arise.
  - (viii) The Commission while issuing the notice has given only the hint about the contravention and the prima facie cause has not been disclosed. No proceedings are pending and unless personal presence is essential for reasons of personal knowledge the Board Members could not be asked to be present and there is no allegations to the effect that their presence is required on account of their personal knowledge. The Id. Counsel attributed the pre-judgement and pre-determination to the construction of language of the show cause notices.

**Shri K. D. Shreedhar, the Id. Counsel for respondents, S/Shri R. K. Sharma, Member (Civil) and J. S. Rana, Member (Admn.)** then argued as under:

He agreed with whatever his other two colleagues had said and wanted to reinforce the argument that the Board did not dispute the jurisdiction of the Commission in respect of the determination of tariff. No complaint had been made by anyone against any of the respondents as to the violation of the tariff rates.

**V. COMMISSION'S VIEWS:**

The copy of the judgement reported in AIR SC 1962 pages 1602/1680 was not filed by the Id. Counsel. However, this has been procured and gone thro' by the Commission. It, however, does not appear to be relevant in the present context and is not of any avail to the respondents.

In order to capture the entire gamut of matter encompassing the show cause notice cases it should do well even at the cost of reading fatigue to give a brief history of the case. The Commission was established and incorporated on December 30, 2000 in terms of Section 17 of ERC Act, 1998 and became functional with the joining of Single Member on January 6, 2001. The Commission issued guidelines for revenue and tariff filing specifying the "methodology and procedure" in calculating the expected revenue from charges which the Board is permitted to recover and in determining tariffs to collect those revenues as required under sub section (4) of Section 29, on 23<sup>rd</sup> February, 2001 and HPERC (Conduct of Business) Regulations, 2001 specifying, inter alia, the "terms and conditions" for the fixation of tariff as required in sub section (2) of Section 29.

The HPSEB filed the petition for determination of Annual Revenue Requirement and Distribution & Retail Supply Tariff on April 30, 2001 and Transmission & Bulk supply tariff petition on August 14, 2001. The Commission issued a concept paper which discussed the objectives of tariff setting, tariff principles, methodology and important issues involved in determining the retail electricity tariff in HP. The notice inviting objections to the tariff proposal of the HPSEB were published in leading newspapers on July 15, 2001 (Distribution & Retail Supply Tariff) and on August 25, 2001 (Transmission & Bulk Supply Tariff). Some 39 objections were received and 32

objectors, whose objections were found to be valid and complete in all respects, were asked to appear before the Commission in the public hearings held at five different locations in HP. The Tariff Order was issued on October 29, 2001 which came into force from November 1, 2001.

In Chapter-7 of the said Tariff Order, the Commission issued some tariff related directions and ordered the Board to comply with the same. The directions followed the objections taken and observations made by various objectors and the replies given by the Board on various issues of concern to the public and the consumers. The Tariff Order was issued in order to balance the interest of public and the stakeholders on one side and the HPSEB on the other. The objections and observations together with the rejoinders of HPSEB duly influenced the process of determination of tariff by the commission. The tariff related directions issued together with the hike in rates of tariffs have to be viewed as integral parts of the order. One without the other is incomplete. Any contravention of directions is betrayal of the public interest. Some directions have not been complied with by the HPSEB within the time stipulated in the said directions nor is the Commission apprised of the steps taken and the progress made, if any, towards compliance of the said directions. The impugned show cause notices have been issued under Section 45 of ERC Act, 1998 for the alleged contraventions.

In order to appreciate the principal thrust of arguments, addressed by the Id. counsels it will do well to give hereunder the Statement of Objects and Reasons of the ERC Act, 1998 as enshrined in the “INTRODUCTION” to the Act. :

“India’s power sector is beset by problems that impede its capacity to respond to the rapidly growing demand for energy brought about by economic liberalisation. Despite the stated desire for reform and the initial measures that have been implemented, serious problems persist. As the problems of the Power Sector deepen, reform becomes increasingly difficult underscoring the need to act decisively and without delay. It is essential that the Government implement significant reforms by focussing on the fundamental issues facing the power sector, namely the lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, the limited involvement of private sector skills and resources and the absence of an independent regulatory authority.

Considering the paramount importance of restructuring the power sector, Government of India organised two Conferences of Chief ministers to discuss the whole gamut of issues in the power sector and the outcome of these meetings was the adoption of the Common Minimum National Action Plan for Power (CMNPP).

2. The CMNPP recognised that the gap between demand and supply of power is widening and acknowledged that the financial position of State Electricity Boards is fast deteriorating and the future development in the power sector cannot be sustained without viable State Electricity Boards and improvement of their operational performance. The CMNPP identified creation of regulatory Commission as a step in this direction and specifically provided for establishment of the Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs). After the finalisation of the national agenda contained in CMNPP, the Ministry of Power assigned the task of studying the restructuring needs of the regulatory system to Administrative Staff College of India (ASCI), Hyderabad. The ASCI report strongly recommended the creation of independent Electricity Regulatory Commissions both at the Centre and the States.

3. To give effect to the aforesaid proposals, the Electricity Regulatory Commissions Bill, 1997 was introduced in the Lok Sabha on 14<sup>th</sup> August 1997. However, it could not be passed due to the dissolution of the Eleventh Lok Sabha. This has resulted in delay in establishing the Regulatory Commissions leading to confusion and misgivings in various sections about the commitment of the Government to the reforms and restructuring of the power sector. Needless to say, this has also slowed down the flow of public and private investment in power sector. Since it was considered necessary to ensure the speedy establishment of the Regulatory Commissions and as Parliament was not in session, the President promulgated the Electricity Regulatory Commissions Ordinance, 1998 on the 25<sup>th</sup> day of April, 1998.

4. The salient features of the said Ordinance are as follows: -

(a) It provides for the establishment of a Central Electricity Regulatory Commission at the Central level and State Electricity Commissions at the State levels;

(b) The main functions of CERC are: -

- (i) to regulate the tariff .....
- (ii) to regulate inter-.....;
- (iii) to regulate inter-State .....
- (iv) to aid and advise .....

(c) The main functions of the SERC, to start with, shall be: -

- (i) to determine the tariff for electricity, wholesale, bulk, grid and retail;
- (ii) to determine the tariff payable for use of the transmission facilities;
- (iii) to regulate power purchase and procurement process of the transmission utilities, etc.
- (iv) subsequently, as and when each State Government notifies, other regulatory functions could also be assigned to SERCs.

(d) it also aims at improving the financial health of the State Electricity Boards (SEBs) which are loosing heavily on account of irrational tariffs and lack of budgetary support from the State Governments as a result of which, the SEBs have become incapable of even proper maintenance, leave alone purposive investment. Further the lack of creditworthiness of SEBs has been a deterrent in attracting investment both from the public and private sectors. Hence, it is made mandatory for State Commissions to fix tariff in a manner that none of the consumers or class of consumers shall be charged less than fifty per cent, of the average cost of supply, it enables the State Governments to exercise the option of providing subsidies to weaker sections on condition that the State Governments through a subsidy compensate the SEBs. As regards the agriculture sector, it provides that if the State Commission, considers it necessary it may allow the consumers in the agricultural sector to be charged less than fifty per-cent for a maximum period of three years from the date of commencement of the Ordinance. It also empowers the State Government to reduce the tariff further but in that case it shall compensate the SEBs or its successor utility, the difference between the tariff fixed by the State Commission and the tariff proposed by the State Government by providing budgetary allocations. Therefore, it enables the State Governments to fix any



tariff for agriculture and other sectors provided it gives subsidy to State Electricity Boards to meet the loss.

5. The Bill seeks to replace the said Ordinance.”

The essence of objects and reasons is the necessity of independent regulatory authority in order to implement significant reforms by focussing on the fundamental issues facing the power sector, namely the lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, the limited involvement of private sector skills and resources and the absence of an independent regulatory authority. This focus arises out of fast deteriorating financial position of the State Electricity Board. Creation of independent regulatory Commissions was identified as a step in the direction of sustainable development in the power sector and viable State Electricity Board. Clause (d) of para-4 sets aims for State Electricity Regulatory Commission for improving financial health of the State Electricity Boards which are loosing heavily on account of irrational tariff and lack of budgetary support from the State Government as a result of which SEBs have become incapable of even maintenance, leave alone purposive investment. Lack of creditworthiness of SEBs has been cited as a deterrent in attracting investment both from the public and private sectors. The State Commissions have, therefore, been mandated to fix tariffs in a manner that none of the consumers or class of the consumers shall be charged less than 50% of the average cost of the supply.

Clause (d) of para-4 of the “INTRODUCTION” to the ERC Act, 1998 setting out the aim of improving financial health of the SEBs, therefore, stands out as the singular essence of objects and reasons of the ERC Act. Financial health of the SEBs cannot be improved merely by determination of tariff and leaving the implementation of related directions or the compliance thereof to the Electricity Board. Again the improvement in the financial health of the SEBs cannot be brought about merely by giving additional revenue to the Board and not monitoring and controlling the performance and the costs. The annual revenue requirement is function of the income and the expenditure and whilst the Commission through the tariffs can give additional revenue to the Board, its fiscal management has to be prudent enough to contain the expenditure strictly as allowed by the Commission. The main functions of the SERCs given in clause(c) of

para-4 of the ordinance have since been replaced by functions under Section 22 (1) of the ERC Act which are the mandatory and the main functions. Subsequently as and when the State Government so notifies, other regulatory functions could also be assigned to SERCs. It would be improper to refer to functions under sub-section (1) of Section 22 as non-regulatory and those under sub-section (2) as regulatory as contended by the Ld. Counsels. All the functions under both the sub-sections are regulatory in the strictest sense of law. The Act is called Regulatory Commissions Act and the Commissions are mandated to regulate the working of the utilities. The words “other regulatory functions” above clearly mean that under sub-section (2) the functions are “other regulatory functions whereas those in sub-section (1) are main regulatory functions. Clause (c) of para-4 of the ordinance refers to these functions as main functions while Section 22 (1) of the ERC Act makes these as mandatory functions. There is nothing to define these as “general functions” or the “specific functions”. The intention of the legislature in keeping regulatory functions in two sub sections was clearly in their nature as mandatory and non-mandatory in carrying out the objects and the purposes of the Act. The inescapable intention of this would seem that even without powers under section 22 (2) of the ERC Act, the SERCs should be able to bring about a turn around and the improvement in the financial health of the SEBs, being the main aim which cannot be done merely by determination of the tariffs with no control over its implementation or compliance of the attendant and related directives.

The thrust of argument was centred as single theme of functions conferred under Sections 22 (1) and 22(2) and everything else followed by way of linking them ultimately to Sections 27, 39, 45, 47, 49 and 52 of the ERC Act. The Commission has gone over Section 22 several times in trying to find out inclusivity of one in the other and finds that sub sections (1) and (2) are mutually exclusive and the ejusedem generis rule is not applicable here. The very language of the two sub-sections and the objectives intended to be achieved thro’ them negative any intention of the legislature to attract the rule of ejusedem generis. The judgement referred to in SC AIR 1972 page 1863 paras 9 and 15 referred to by the Id. Counsel does not appear to be relevant in the present context and is not of any avail to the respondents. Sub section (1) of Section 22 starts with the words “subject to the provision of Chapter-III the State Commission shall discharge the following functions, namely”; sub section (2) starts with the words

“subject to the provision of Chapter-III and without prejudice to the provisions of sub section (1)”. Both the sub sections are subject to Chapter-III and not to each other. Clauses (a) to (p) of sub section (2) nowhere encroach upon Clauses (a) to (d) of sub section (1) of Section 22. The only difference between the two sub sections is that the powers under sub section (1) are mandatory whereas those in sub section (2) are non-mandatory. In any case it is obligatory on the part of the State Commission to discharge the functions under sub section (1) of Section 22. Clause (d) of sub section (1) may be construed strictly in relation to the functions under Clauses (a), (b) and (c) of sub section (1) if not in relation to clauses (a) to (p) of sub section (2). In that view the functions to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act have to be construed strictly in relation to determination of tariff in clauses (a) and (b) and to regulate power purchase and procurement process of the transmission utilities, etc. as in clause (c) of sub section (1). As long as clause (d) is used in relation to clauses (a), (b) and (c) the construction and construing should be perfectly harmonious. Nowhere between clauses (a) to (p) of sub section (2) nor in clauses (a) to (d) of sub section (1) has the power to issue directions, been specifically or directly enumerated. The powers to give direction under the Act, Rules or Regulations made thereunder are the inherent powers of the Commission which is a creation of the Electricity Regulatory Commissions Act, 1998. The functions of determination of tariff and to promote competition, efficiency and economy in relation to the determination of tariff for electricity as in clauses (a) and (d) of sub section (1) have to be read together. The dictionary meaning of the word ‘determination’ is ‘quality of law: the settlement of a dispute by the authoritative decision of a judge’. The determination of tariff is an all-inclusive term for determination, implementation and compliance. It cannot be split into subjective expediency. Any other interpretation would conflict with Section 45 of the ERC Act which is reproduced as under:

“45. Punishment for non-compliance of directions given by a Commission.

(1) In case any complaint is filed before the Commission by any person or if the Commission is satisfied that any person has contravened any directions issued by the Commission under this Act, rules or regulations made there under, the Commission may after giving such person an opportunity of being heard in the matter, by order in

writing, direct that without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed rupees one lakh for each contravention and in case of a continuing failure with an additional penalty which may extend to rupees six thousand for every day during which the failure continues after contravention of the first such direction.

(2) Any amount payable under this section, if not paid, may be recovered as if it were an arrear of land revenue.”

The provision is very clear and unambiguous. It does not specifically inhibit or prohibit the punishment for non-compliance of the related directions issued by the Commission while exercising particular functions of the Commission. It does not qualify contravention of the ‘directions’ issued only under sub section (2) of section 22 for punishment.

The various provisions of Section 22 (2) of the ERC Act have been reproduced under main heading. “ IV DEFENCE ARGUMENTS”, where it has been mentioned that to another query from the Commission as to what to do where the Commission had allowed higher revenue over what had been asked for by the Board as in para 5.15 of the Tariff Order and as in para 4 of Annexure 5.2 (Schedule of General and Service Charges) of the Tariff Order to the extent of Rs.3.60 Crores for replacement of dead stop/defective meters after March 31, 2002, the Id. Counsel had argued that the loss is to the Board only and if the Commission felt that the Board has not taken action to replace meters despite the higher meter rent allowed by the Commission, the Commission could reduce the rental thereof. This argument contradicts the Id. Counsel’s own stand that Commission had no powers to enforce the implementation and compliance of the tariff order.

The Commission has heard the arguments of the Id. Counsels with rapt attention but remains totally unconvinced with their attempt to link the Commission’s powers to give directions only to functions under section 22(2).

The primary function of the Regulatory Commission while determining the tariff is to balance the interest of the utility and stakeholders including consumers so as to ensure that the utility gets fair return on its investment and the consumers are provided electricity at an adequate and improved level of efficiency. The Section 22(1)(a) stipulates that the State Commission shall determine the tariff for electricity, wholesale,

bulk, or retail as the case may be in the manner provided in Section 29. The various provisions of Section 29 have been reproduced under main heading IV – DEFENCE ARGUMENTS. Section 29(2)(b) of the Act provides that while determining the tariff, the State Commission shall be guided, in the case of the Board by the principles in section 59 of the Electricity (Supply) Act, 1948. The Section 59 (1) of the Electricity (Supply) Act, 1948 provides as under: -

59: General Principles for Board's finance:

“(1) The Board shall, after taking credit for any subvention from the State Government under Section 63, carry on its operation under this Act and adjust its tariffs so as to ensure that the total revenues in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than three percent, or such higher percentage, as the State Government may, by notification in the official Gazette, specify in this behalf, of the value of the fixed assets of the Board in service at the beginning of such year.

Explanation: For the purposes of this sub-section “value of the fixed assets of the Board in service at the beginning of the year’ means the original cost of such fixed assets as reduced by the aggregate of the cumulative depreciation in respect of such assets calculated in accordance with the provisions of this Act and consumers’ contribution for service lines.”

The Electricity Board which is a natural monopoly for transmission and distribution of electricity, in the absence of competition, has a tendency to set prices without providing commensurate value for money. Further the absence of competition leads to operational inefficiencies, poor quality of service and inefficient allocation of resources. This leads to high cost and ultimately the consumer has to pay a high price.

While determining the tariff, the prudence and efficiency of cost is major regulatory concern. The costs can be made high through inefficient use of capital, inefficiencies in production and delivery and unnecessary spending on non-related activities. Thus the various costs indicated in the tariff petition are to be examined by the Commission and only these costs, which are found to be prudent, can be passed through.

Section 59(1) of Electricity (Supply) Act, 1948 clearly provides that the Board has to carry on its operations in such a manner so as to ensure that the total revenue in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than 3% of the value of the fixed assets of the Board in service at the beginning of the year. It is, therefore, imperative for the Commission that before allowing 3% surplus on the net fixed assets the various elements, which go in for the determination of the tariff, are based upon the actual data so that the consumers do not have to bear extra costs. Section 29(2)(c)(d)(e)&(f) of ERC Act, 1998 states that the tariff progressively reflect the cost of supply of electricity at an adequate and improving level of efficiency, the factors which would encourage efficiency, economical use of the resources, good performance, optimum investment and other matters; the interest of the consumers are safe-guarded and the electricity generation, transmission, distribution and supply are conducted on commercial principles. While determining the tariff for the year 2001-02, the Commission simply followed these principles and issued various directions as contained in Chapter-7 of its Tariff Order based on the provisions of Section 29(2) and also on the basis of the objections/suggestions received from the various stake-holders on the petitions filed by the Board. It is thus apparent that the Commission has inherent powers to issue directions while determining the tariff in view of the provisions of Section 22 (1) and 29 of the ERC Act.

There is no prohibition under Section 27. When the Board accepts the tariff it is certainly bound by the directions given in the Tariff Order. The Commission has already ruled against any reasonable nexus between Section 22 (2) and the powers to give directions under the Act, rules or regulations made there under.

Section 39: It refers to the powers of State Government to give directions in the matter of policy involving public interest. The contention of the Id. Counsels that the directions issued by the Commission should have gone to the Government as recommendations/suggestions for further issuing the same to HPSEB under Section 78(a) of the Electricity (Supply) Act, 1948 is again not tenable in the light of view taken in the foregoing.

Section 22 (1), Section 29 and Section 45 if read together should lead to the only conclusion that the determination of tariff under Section 22 (1) shall be done by determination of terms and conditions for fixation of tariff thro' regulations and the guidelines laid down in Section 29 and non-implementation or non-compliance of the directions shall be dealt with under Section 44 and Section 45.

Section 47 is an enabling provision and does not dilute Commission's jurisdiction for taking impugned action. The Section is reproduced below:

“47. Offences by companies: -

(1) Where an offence under this Act has been committed by company, every person who at the time, the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation: - For the purposes of this section,

- (a) “company” means any body corporate and includes a firm or other association of individuals; and
- (b) “director”, in relation to a firm, means a partner in the firm. ”

The HP State Electricity Board is a company as per the explanation given in the footnote of Section 47 being a body corporate under Section 12 of Electricity (Supply) Act, 1948. The Respondents 1 to 6 viz. the Chairman and the Members of the Board are

responsible for carrying out the affairs of the Board and it cannot be said that the contravention of the directions of the Commission is not attributable to the neglect on the part of the concerned Member of the Board. Further there is a collective and collegiate responsibility of all the respondents for any action taken or intended to be taken in the Board. It was expected of the concerned Member to initiate expeditious action on the directions of the Commission and the Board collectively was expected to take expeditious decisions and all necessary steps for implementing the directions in the time allowed by the Commission.

Section 49: No inconsistency was pointed out by the Id. Counsels vis-à-vis this Section.

Section 52: The provision of ERC Act have been given overriding effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act save as otherwise provided in Section 49.

Section 43: The Id. Counsel also raised the additional Section 43 of ERC Act to the protection of action taken in good faith by the respondents who were first officers of the State Government and then the members or Chairman of the HPSEB. Section 43 is reproduced hereunder: -

“43. Protection of action taken in good faith.

No suit, prosecution or other legal proceedings shall lie against the Central or State Government or the Central or State Commission or any officer of Central or State Government or any Members, officer or other employees of the Central or State Commission for anything which is in good faith done or intended to be done under this Act or the rules or regulations made there under.”

It is evidently clear that the protection is available for anything which is in good faith done or intended to be done under ERC Act, 1998 or the rules or regulations made there under. It cannot be said in favour of the respondents that they were acting in good faith while contravening the directions issued by the Commission under the ERC Act, rules or regulations made there under. In any case the protection is available to only such Government officers who are acting or intend to act under ERC Act, 1998. Respondents/objectors have the protection under Section 82 of Electricity (Supply) Act, 1948 but for anything which is in good faith done or intended to be done under E (S) Act, 1948. Can the immunity be claimed for acts done not in good faith? The



respondents certainly cannot claim protection for acts not done in good faith under E (S) Act, 1948 anyway.

The point issue No. (i) posed by the Commission whether there is any direct or indirect legal prohibition against the Commission for taking the impugned action in view of specific provisions contained in Sections 22 (1) 27, 39, 45, 47, 49 and 52 is unarguably settled against the respondents and in favour of the Commission after their principal contention with regard to any reasonable nexus between Section 22 (1) and powers to give directions fails.

Point Issue (ii) also goes in favour of the Commission after (i) is decided in favour of the Commission in view of the above discussion.

Point Issues (iii) to (vii): These points also go in favour of the Commission after the effort of Id. Counsels to segregate the powers to give directions from powers of determination and power of punishment in Section 22 (1), Section 29 and Section 45 of ERC Act fails. The contention made in para F of the reply that the Commission's Order dated October 29, 2001 is incapable of compliance overnight for want of funds is not borne out of facts. Most of the plans and studies required in the directions issued by the Commission do not require any funds at all. They, of course, require some seriousness, dedication, application of mind and due diligence which should not have been difficult considering that the Board has on its rolls, hundreds of engineers, administrators and accounts professionals besides the Members who are supposed to be men of eminence in their respective fields as stipulated in sub-sections (2), (4) and (5) of Section 5 of Electricity (Supply) Act, 1948 reproduced here below:

“(2) The Board shall consist of no less than three and not more than seven members appointed by the State Government.

(4) Of the members-

- (a) one shall be a person who has experience of, and has shown capacity in, commercial matters and administration;
- (b) one shall be an electrical engineer with wide experience; and
- (c) one shall be a person who has experience of accounting the financial matters in a public utility undertaking, preferably an electricity supply undertaking.

(5) One of the members possessing any of the qualifications specified in subsection (4) shall be appointed by the State Government to be the Chairman of the Board.”

Again nothing prevented the Board from outsourcing the plans and the studies should it have discovered that it had no skills for any particular field. To a point raised from the Commission that the Commission had asked HPSEB to only submit the plans and studies which did not require any investment, the Id. Counsel Shri D. D. Sood’s argument that he was not discussing the merit was evasive.

Point issue (viii) The language of show cause notices was constructed as per known practice of drafting of show cause notice. The HPSEB’s own affidavits, undertakings and acquiescence of the Tariff Order are sufficient material before the Commission for making a prima facie case against the respondents. The notices clearly disclosed the nature of contraventions and the prima facie cause. The directions are given in Chapter-7 of the Tariff Order, which are self-speaking. The directions have not been complied within the stipulated time which clearly establish a prima facie cause. The Commission was satisfied with the prima facie cause having arisen against the respondents. In the matter of show cause notice with regard to Malana Project Member (Civil) was asked to present himself before the Commission to explain the difficulties, if any, in obtaining the information from Malana Power Company for the purpose of carrying out the comparison. The allegation of pre-judgement and pre-determination owing to the construction of language of the show cause notices is not tenable and is, therefore, rejected.

There is no vagueness in the notice as already discussed above. The notice is not vague at all and nothing of the kind has been brought forth by the respondents despite specific query on the issue. Due date of compliance of this direction was March 31,2002 as per the Tariff Order. The Board had already slipped by one and a half month when the show cause notice was issued. By questioning futilely the legality and the validity of the direction and the notice, the respondents have further delayed the compliance by more than four months. This is likely to delay the compliance of the direction further thus torpedoing the very object of and the reason for issuing the direction. The respondents had the fullest opportunity of filing the full reply but by resorting to such

stalling and delaying tactics, their intention seems to further delay and stall the compliance of directions. The commission cannot be a silent spectator on matter of public interest of such nature and magnitude. It also has the obligation to protect the Board from itself. The respondents aren't entitled to any further opportunity of filing the reply on merit. The contentions made in para 'K' of the reply are nothing but dilatory tactics to avoid a due and timely verdict in the matter. The contention is, therefore, rejected. The discussion in the foregoing paras conclusively and comprehensively clinches the eight points at issue solidly in favour of the Commission and against the respondents. The Commission is convinced that there is no direct or indirect legal prohibition and is in no doubt as to its jurisdiction in taking the impugned action. The judgements of the Supreme Court cited by the Id. Counsels are not to be transplanted bodily and applied indiscriminately regardless of the context, facts and circumstances of the case.

The Commission has critically examined the direction vis-à-vis the functions conferred under Section 22(2) and concluded that this direction is not covered under any of the functions under Section 22 (2) of ERC Act, 1998.

#### **VI. CONCLUSION:**

After considering the whole matter consciously the objections made by the respondents/objectors are not sustainable. It is conclusively proved and the Commission is perfectly satisfied that the respondents/objectors have jointly and severally contravened direction No.7.26 issued by the Commission in Chapter 7 of the Tariff Order dated October 29, 2001 under Section 22 (1) of the ERC Act, 1998 by not complying with the aforesaid direction of the commission by the prescribed date of March 31, 2002

Now, therefore, it is ordered that without prejudice to any other penalty to which they may be liable under the ERC Act, 1998 the above named respondents/objectors are jointly and severally liable for the imposition of appropriate penalty under Section 45 of the ERC Act, 1998.

The Commission has given a very deep and anxious thought to the quantum of penalty on all these persons. The Commission is conscious of the fact that the State Electricity

Board does not enjoy the total independence in its working and has to look to the government for everything. The working in the Electricity Board together with its bureaucratic rigidities and red tape are transplants from the government working where the decision-making is reduced to tortuous and safe decision making. The break from such entrenched working culture and system to a more efficient, responsive and dynamic decision-making cannot be expected suddenly with the coming up of the Regulatory Commission HPSEB shall, however, have to make serious and concerted efforts to break away from such a culture and system and sooner the better. The Electricity Regulatory Commission is the first step towards “arresting deteriorating condition of the State Electricity Board and to make plans for future developments” as enshrined in INTRODUCTION Chapter of the ERC Act, 1998. The Board shall have to get used to and accept the existence of HPERC and to submit to its rightful and legal directions instead of using the legal processes to subvert the real objective and the gains flowing out of such directions. The right to use the legal processes is fundamental but must not be used for stalling the reforms. It could erode the Board’s long-term viability and instead prove fatal to its very existence. The spirit behind the creation of Regulatory Commission must be respected and it should be taken seriously as a friend, guide, facilitator and above all a watchdog over the power sector. After all, the Regulator and the Utility have common good of the power sector, financial viability of the Board and the consumer at the bottom of their hearts. The Board must recognise the opportunities arising from and the inevitability of the reform measures, which could indeed revitalise the utility.

The Commission has absolutely no doubt whatsoever, that the directions given in the Tariff Order were aimed at making HPSEB a truly efficient, responsive and dynamic organisation. The fact that instead of complying with the directions they were questioned futilely is a sad commentary on how well meaning directions of the Commission could be subverted and hijacked to nothingness and nowhere and how the importance and urgency of the said directions could be torn to shreds on the bugbear of individual egos, denial of the stark realities, and resistance to change and adaptation to new Regulatory paradigm.

While the contravention is attributable to the neglect on the part of Respondent No.7 in the joint liability for imposition of fine it is very difficult to determine the

apportionment of individual neglect on the part of Respondent Nos. 1 to 6. They are nevertheless liable for penalty. Taking, however, extremely lenient view, being the first batch of such contraventions, the Commission is inclined to discharge respondents 1 to 6 with stern warning that in future the Commission would deal with any contravention of its direction by holding the Members and the Chairman jointly and severally liable for the imposition of the appropriate penalty under Section 45 of the ERC Act. Respondents 1 to 6, therefore, are discharged with the above stern warning.

The instant matter is one of the first incidents of the contravention of the Commission's orders/directions attributable to the conduct of respondents/objectors. The Commission has determined the quantum of fine to be imposed after considering the nature and extent of non-compliance and other relevant factors as per Regulation 51 (iii) of HPERC's Conduct of Business Regulations, 2001 under the overall provision of Section 45 of the ERC Act, 1998. Penalty of Rs.10,000/- only is hereby imposed upon Respondent no.7- HPSEB. The penalty be deposited with the Secretary of the Commission within a period of 30 days from today. Additional penalty for continuing failure @ Rs.600 /- only per day is further imposed on HPSEB and shall be ipso facto recoverable immediately after March 31,2002 until the date of compliance to the Commission's satisfaction to be so notified by the Commission. The Board shall submit the Status/Action taken Reports on the Fifteenth day of every month until compliance is made.

Announced in the presence of respondents/objectors mentioned above.

Announced today the 17th August, 2002.

**Sd/-**  
**(S. S. Gupta)**  
**Chairman**

